

Chase Bag Company and Southern California Printing Specialties & Paper Products Union, District Council #2, International Printing and Graphic Communications Union. Case 32-CA-5350

25 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS

On 8 March 1984 Administrative Law Judge Roger B. Holmes issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The Company, a Delaware corporation, manufactures multiwall paper bags at its facility in Hanford, California, where it annually ships goods valued over \$50,000 directly outside the State of California. Accordingly, Chase Bag Company is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

² In sec. VI, par. 9, of his decision the judge inadvertently erred in stating that the 9 March 1983 written warning was based on Fagundes' producing approximately 6000 bags with loose walls. The record discloses that this production mistake occurred subsequent to the issuance of the warning. The judge's error does not affect the outcome of this case.

DECISION

STATEMENT OF THE CASE

ROGER B. HOLMES, Administrative Law Judge. The unfair labor practice charge in this case was filed on March 22, 1983, by Southern California Printing Specialties & Paper Products Union, District Council #2, International Printing and Graphic Communications Union. The General Counsel's complaint was issued on May 24, 1983. The complaint was amended on the first day of the trial. The General Counsel alleges that the Chase Bag Company has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. As amended at the trial, the General Counsel's complaint alleges in paragraphs 6 and 7:

(a) On or about February 7, 1983, Respondent forced its employee John Richard Fagundes to accept reassignment to a new and more onerous position;

(b) On or about February 8, 1983, March 4, 1983, and March 9, 1983, Respondent issued disciplinary warning notices to Fagundes;

(c) On or about March 10, 1983, Respondent discharged Fagundes, and since that date has failed and refused, and continues to fail and refuse, to reinstate him to his former position of employment.

7. Respondent engaged in the conduct described above in paragraph 6 because Fagundes joined or assisted the Union, or engaged in other protected, concerted activities for the purposes of collective bargaining or other mutual aid or protection.

In the Respondent's answer to the General Counsel's complaint, as amended at the trial, the Respondent denied the commission of the alleged unfair labor practices.

The trial in this proceeding was held on October 18, 19, and 20, 1983, at Fresno, California. The time for the filing of posttrial briefs was extended to December 21, 1983. At the time that counsel for the General Counsel filed her posttrial brief, she also filed a motion to correct transcript. The General Counsel's motion has not been opposed, and therefore the General Counsel's motion is granted. In addition, punctuation has been added to some of the quoted material for purposes of clarity.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The jurisdiction of the Board over the business operations of the Employer is not an issue in this proceeding. The Employer is engaged in the manufacture of multiwall paper bags at its Hanford, California facility. Its operations meet the Board's direct outflow jurisdictional standard.

The status of the Charging Party Union as being a labor organization within the meaning of Section 2(5) of the Act also is not in issue. Such status was admitted in the pleadings.

II. THE WITNESSES AND CREDIBILITY RESOLUTIONS

Seven persons were called as witnesses to testify at the trial in this proceeding. In alphabetical order by their last names, they are: Edward B. Davis, who is a production supervisor of the Respondent; John Richard Fagundes, who was employed by the Respondent from August 24, 1979, to March 10, 1983, and who is the alleged discriminatee in this proceeding; David Hall, who has been a production supervisor of the Respondent since April 1983, and who, previously, was a tuber operator; Fred Allen Hansen, who was employed by the Respondent in the position of bottomer feeder at the time of the trial; Donald Wayne Helmuth, who was employed as an operator for the Respondent at the time of the trial and who, previously, had worked as a janitor, stacker, palletizer, and shafter at the Respondent's facility; Robert Pease, who has been the plant superintendent for the Respondent since the plant opened in 1979; and James R. Wade, who is a supervisor for the Respondent.

In setting forth the findings of fact in the sections to follow, I have relied on portions of the testimony from each one of the witnesses who testified during the trial proceedings, a substantial amount of documentary evidence which was introduced by the parties at the trial, and stipulations of fact on which the parties reached agreement at the trial. In basing certain findings of fact on portions of the witnesses' testimony, I have given consideration to the demeanor of all the witnesses as they gave their versions of the events in question in this proceeding. Some portions of their testimony were related more convincingly at the trial than were other portions. Some witnesses had better recollections of some events, and appeared to be more certain in their recall, while they appeared to be less certain of their recall of other matters. (See, for example, *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), with regard to the acceptance of some, but not all, of the testimony of a witness.)

In addition, some portions of the testimony of witnesses were not contradicted at the trial by testimony from other persons. For example, the accounts of conversations involving Plant Manager Garrett were not contradicted by Garrett because he did not testify at the trial in this proceeding. That observation is not made in the sense of being critical but, instead, to illustrate the point that certain testimony is uncontradicted.

As will be shown in the findings of fact to follow, reliance has been placed in many instances on documentary evidence. The documents, which were prepared near the time of the occurrence of certain events, seemed to be more reliable than attempts to recall those events at a much later time during the trial proceedings.

While all the testimony and the documentary evidence have been considered, the findings of fact will be limited to the credited evidence in this proceeding. (See, for example, *ABC Specialty Foods*, 234 NLRB 475 fn. 2 (1978).)

III. THE EVENTS PERTAINING TO THE ORGANIZATIONAL ATTEMPTS BY UNIONS AMONG RESPONDENT'S EMPLOYEES

John Richard Fagundes was employed by the Respondent from August 24, 1979, to March 10, 1983. During that period of time, there were three attempts by unions to organize the employees at the Respondent's plant. The first and second organizing attempts were made by the Carpenters Union. With regard to the first union organizational campaign at the plant, Fagundes said, "I handed out union cards and attended meetings and tried to get people to attend meetings." With regard to the second union organizational campaign, Fagundes said, "The same as the first. I handed out cards, attended meetings, tried to get other people to." On one occasion during the second union organizational attempt, Fagundes wore a shirt with a "Vote Yes" inscription on it, while he was at work at the plant. Fagundes also had a pencil with a flag on the end of it. The flag had a "Vote Yes" inscription on it. Fagundes said, "I just waved it around a little bit." Fagundes recalled that Bob Nowak, who was a company supervisor at the time but who had left the Company before the time of the trial, asked Fagundes how he felt about the Union and what Fagundes thought the Union could get them.

Fagundes first became aware of the organizing campaign by the Charging Party Union in September 1982. Fagundes said, "I passed out cards, attended meetings, encouraged other employees to attend meetings." During the Charging Party Union's campaign, Fagundes also distributed union cards during his nonworking time at the plant. Fagundes wore union buttons and union patches on his clothing while he was at work at the plant. Fagundes commenced doing so about 2 months before the representation election in December 1982.

A day or two before the election, Fagundes had a brief conversation with Supervisor James R. Wade. On that occasion, Wade asked Fagundes if he had holes in his clothes. Fagundes asked why. Wade replied because of all the patches and badges on Fagundes that Fagundes must have holes in his clothing.

About a week after the election was held, Fagundes had a conversation with Supervisor Tom Emerson. Supervisor Wade also was present. The conversation took place in Wade's office where Fagundes had gone to obtain a Band-Aid or an aspirin from the first aid kit. As Fagundes was leaving the office, Emerson said that Fagundes' buttons could be a safety hazard because the buttons could poke Fagundes in the chest. Emerson told Fagundes to make sure the buttons "were on good." Fagundes made no reply.

Fagundes continued to wear union buttons after the representation election and up to the time of his termination from employment. Fagundes said that other employees had worn union buttons or stickers to work before the election, but he did not know of any employees who did so after the election. However, employee Freddy Allen Hansen stated at the trial that some employees occasionally wore union buttons at the plant after the election.

Fagundes acknowledged at the trial that there were some other employees of the Respondent who wore union buttons or otherwise indicated their support of the Charging Party Union during the organizational campaign. Fagundes said that David Hall was one of those persons, and that Hall had attended all the union meetings which Fagundes had attended. Hall was promoted to a supervisory position by the Company after the Union's campaign. Fagundes said that Jess Alonzo was a supporter of the union, and that Alonzo had attended union meetings which Fagundes also had attended. During the Union's campaign, the Company promoted Alonzo to a supervisory position in the shipping department.

Supervisor Wade acknowledged at the trial that he had observed Fagundes wearing union buttons, and that he had told Fagundes that he had better be careful or he was going to tear his T-shirt. According to Wade, his purpose in making the comment to Fagundes was to kid Fagundes but not to harass him. Supervisor Wade also acknowledged at the trial that he had overheard Supervisor Emerson tell Fagundes that his buttons could be "a safety hazard, get caught in the machine or something."

Supervisor Edward B. Davis acknowledged at the trial that he had observed Fagundes wearing union buttons both prior to the election and after the election. Davis

said that he was also aware that David Hall and Donald Wayne Helmuth were union adherents.

Introduced into evidence as General Counsel's Exhibits 2(a) through 2(w) were copies of literature distributed by the Employer to its employees prior to the representation election held on December 9, 1982. It is not alleged that any of the documents contain statements which are violative of Section 8(a)(1) of the Act but, in the General Counsel's view, the documents show the Respondent's animosity towards the Union. The parties stipulated that the Respondent did oppose union organizing. According to Fagundes, the Union circulated documents to the employees of the Company in response to the Company's documents, and the Union mailed literature to employees' homes and distributed literature off company property.

A couple of weeks after the Union first handbilled at the Employer's plant in March 1982, Supervisor Tom Emerson had a conversation with Freddy Allen Hansen while Hansen was working as a bottomer feeder. Hansen testified, "And he came up and asked me, 'Do you think we need a union in this plant?' I told him, 'No.'" The foregoing conversation is barred by Section 10(b) of the Act from consideration of whether it constitutes an unfair labor practice, and it is not alleged to be an unfair labor practice by the General Counsel. (See the discussion by the attorneys at Tr. 491-496. The same also applies to the subsequent conversations related by Hansen.)

On August 12, 1982, Plant Manager Garrett had a conversation with Hansen while Hansen was working as a bottomer feeder at the plant. Hansen testified, "Mr. Garrett, the plant manager, came over and asked me if I thought if we needed a union in the plant. He also told me I should not compare our benefits with those of the phone company [where] my wife is employed, which has a union."

The next day, there was another conversation between Hansen and Supervisor Emerson at the plant. Hansen testified, "Yes, he asked me do I think I need a union—if we need a union in here. I told him I began to wonder after some of things that have happened here."

A couple of days later, there was a conversation among Hansen, employee Nick Martinez, and Plant Manager Garrett. Hansen testified with regard to what Garrett said on that occasion, "Well, first, he asked us what was the matter with the tubes, and we explained to him that Dennis had put too much glue on 'em, so we tried running 'em, and they wouldn't run through the machine, they were stuck, so we had to unstick 'em again. And he made the statement [if] the union was in here, he'd fire the person that done that, and he would lay off the entire sewing department."

According to Hansen, the Employer held weekly meetings with employees with regard to the union campaign. The meetings were held by departments. There were eight people in the bottoming department at the time. Sometimes four employees in the shipping department were present, and at times there were other employees in attendance with those in the bottoming department. The format of the meetings was to have a lecture and to permit questions from the employees. Hansen recalled at the trial that Fagundes, Bill Vance, Donald

Helmuth, Barbara Yeople, Geri Wilson, and David Hall spoke at the meetings. At the two meetings at which both Hansen and Fagundes were present, Hansen gave his view that "Mr. Fagundes spoke up more than anybody else."

Introduced into evidence as General Counsel's Exhibit 14 was a copy of a document which lists various names with a notation beside each name of "union," "non union," or "undecided." The circumstances surrounding the document are not alleged to be a violation of Section 8(a)(1) of the Act. (See the discussion among the attorneys at Tr. 58-69.)

Supervisor Davis first saw the document referred to above around October 7, 1982, when Davis went into Supervisor Wade's office and observed Brian Garcia holding the document. Garcia was seated at Wade's desk, and the center desk drawer was open. Davis told Garcia that he should not have been in Wade's desk, and that whatever was in the desk was none of Garcia's business. Davis took the document from Garcia and told Garcia to go back to work.

Davis looked at the document, and then he made a copy for himself. Davis put the original document back in Wade's desk. That evening Davis went to Donald Helmuth's house to play cards. While he was there, Davis showed the copy of the document to a union representative.

On the day before the representation election, David Hall attended a meeting with other company supervisors and employees in the Company's lunchroom. The meeting was conducted by the president of the Company whose last name is Book. Hall testified (Tr. 101-102):

Well, he made it clear that he was, you know, definitely not for unions. He had said a few things about the other companies that he had seen companies that were union and that had been shut down because they were nonproductive. That was basically what it was about.

Q. What specifically did he say about Chase Bag?

A. He said that if you didn't have a union, that you would not have to worry about strikes, and he did mention some strikes that had went on at Chase Bag Companies—he did mention a few, that there were strikes, and that he had seen some plants of Chase Bag Company close down that were unionized.

Q. Did he say why they had closed down?

A. They became non-productive as far as, I guess, moneywise.

It was not alleged that the foregoing constituted independent unfair labor practices within the meaning of Section 8(a)(1) of the Act. (See the discussion by the attorneys at Tr. 98-100.)

On the day of the representation election, Helmuth had a conversation with Supervisor Davis about 9 o'clock that morning before the polls were open. At that time, Helmuth was working as an operator on the tuber 3 machine. Helmuth testified (Tr. 137):

Well, Ed came up and started talking about how he didn't want his friends to be laid off and fired, or whatever, if the union gets in. He'd hate to see that.

Q. Did he explain how it would happen if the union got in that people [would] lose their jobs?

A. He didn't explain. He just said he knows Chase Bag won't give in to any of their demands. That was it. And I just argued with him for a minute, and then I told him to just leave me alone.

The foregoing conversation is not alleged to be a violation of Section 8(a)(1) of the Act. (See the discussion by the attorneys at Tr. 134-136.)

On the day of the representation election, Hall overheard a conversation at the tuber 1 machine between Supervisor Davis and employee Kevin Thur. Hall interrupted the conversation and asked Davis if he knew that he was not supposed to be talking to employees on the day of the election. Davis replied that was the first he had heard of that, so he continued talking. After his recollection had been refreshed at the trial, Hall recalled that Davis had said that Leonard Schmitz would be the one to negotiate with them, and that Schmitz was really tough to negotiate with. Schmitz would say no to all the things that they asked for, so the only alternative would be to go on strike.

The foregoing conversation was not alleged to be an unfair labor practice within the meaning of Section 8(a)(1) of the Act. (See the discussion by the attorneys at Tr. 103-104 and 681-682.)

IV. THE OBJECTIONS TO CONDUCT AFFECTING THE REPRESENTATION ELECTION

Introduced into evidence as Respondent's Exhibit 18 was a copy of the hearing officer's Report on Objections in Case 32-RC-1720. The document indicates that it was issued on September 23, 1983, by Hearing Officer John D. Meakin.

At the time of the trial, the period for filing exceptions to the hearing officer's report with the Board in Washington, D.C., was still in effect. (See the discussion at Tr. 743-752.) Both parties indicated in their posttrial briefs that at that point in time the hearing officer's findings, conclusions, and recommendations were pending on appeal before the Board in Washington.

At the time that this decision is being written, I have not been advised by the parties that the Board in Washington has issued a decision with regard to the hearing officer's findings, conclusions, and recommendations with respect to the Union's objections to the conduct affecting the representation election.

The hearing officer's report indicates that the tally of ballots for the representation election revealed that 30 ballots were cast for the Petitioner, who is the Charging Party Union in this unfair labor practice case, and that 31 ballots were cast against union representation. There were two determinative challenged ballots, but the hearing officer's report indicates that those challenges were overruled by the Regional Director in his supplemental report, and that the Board adopted his recommendations in that regard. According to the hearing officer's report, the revised tally of ballots revealed that 30 ballots had

been cast for the Petitioner, and that 33 ballots had been cast against union representation.

The General Counsel's complaint does not allege that any of the conversations related in the hearing officer's report constitute unfair labor practices in violation of Section 8(a)(1) of the Act, but the General Counsel urges that the conversations involving Supervisor Davis show his union animus.

V. SUBSEQUENT EVENTS

A. Certain Events Pertaining to the Employment of Fagundes from August 24, 1979, up to February 3, 1983

Introduced into evidence as General Counsel's Exhibit 22 was a copy of the Employer's one-page employment record of Fagundes. The document indicates that Fagundes began working for the Respondent on August 24, 1979, in the job classification of "baler/palletizer." On September 10, 1979, Fagundes filled a job opening in the job classification of "roll shafter." Fagundes received a raise in pay at that time and subsequent increases in pay on November 22, 1979; February 19, 1980; July 1, 1980; August 19, 1980; February 24, 1981; July 1, 1981; and July 1, 1982, as a roll shafter. The parties stipulated that the Company's records showed that Fagundes acted as the operator on the tuber 1 machine on September 10, 13, 14, 15, 16, 20, 21, and 22 and December 20, 1982. The parties further stipulated that Fagundes acted as the operator on the tuber 4 machine on November 9 and 10, 1982. The parties limited the foregoing stipulations to just the dates mentioned and without reference to other dates that Fagundes may have operated the machines mentioned.

In 1980, Fagundes received a warning from the Company for leaving the plant without punching his timecard in or out.

About March 1981, which was 2 years prior to the time that Fagundes was terminated by the Respondent, Fagundes had a conversation with Bob Nowak, who was the supervisor of Fagundes at the time. According to Fagundes, the discussion pertained to the fact that Fagundes and Lamar Barnes were "not getting along."

About March 1982, which was a year before the termination of Fagundes by the Company, Fagundes received training for a short time on tuber 1 under David Hall, who was the operator of that machine at the time. Fagundes acknowledged at the trial that during his training period Hall "might have mentioned to me that I needed more help." Fagundes believed that Hall told him that he was picking it up, but it "takes time and more training." Fagundes also acknowledged at the trial that Supervisor Wade had "said I wasn't doing well enough."

Fagundes also replaced Lamar Barnes while Barnes was on vacation for 2 weeks each year. Also, Fagundes operated the machine on a couple of occasions for an hour or so when the operator was late in coming to work.

Introduced into evidence as Respondent's Exhibit 2 was a copy of a "Record of Discussion" dated June 1,

1982, and involving Fagundes. The form was signed by Supervisor Wade. The "Reason for Conference," as shown on the form, was "complaints of job performance and visitors entering plant unauthorized." Fagundes comments, as shown on the form, were that he was trying to do his job as best as he could; that he sometimes disagreed with the operator and thought the operator did "stupid things"; that he would tell his girl friend to use the front entrance from now on. Wade's comments, as shown on the form, were that Wade told Fagundes to make an effort to cooperate and to try to get along with people, rather than hinder his crew; that he explained the reason for the rules, and that Fagundes would be sent home if Fagundes' girl friend entered the plant unauthorized; and that Wade had spoken to Fagundes' girl friend. The "Action Taken" portion of the form indicates "warning."

Introduced into evidence as Respondent's Exhibit 1 was a copy of a "Record of Discussion" dated September 23, 1982, and involving Fagundes, signed by Supervisor Wade. Fagundes at the trial did not think that he had seen the document prior to that time, but Fagundes thought it was an accurate summary of what had been said. The reason for the conference as stated on the form was "poor performance and disputes with operators." Fagundes' comments, as shown on the form, were that he was doing a good job; no one had told him otherwise; and he did not think he had problems with the operators. Wade's comments, as shown on the form, were that Fagundes felt he had done everything correctly; that Wade told Fagundes about the problems which the operators had related to Wade, and how Wade felt about Fagundes' performance after Wade had observed him; that Fagundes had problems with his work and his attitude. The "Action Taken" portion of the form states, "warning that next problem could result in 3 day layoff."

In December 1982, Fagundes worked for about 1-1/2 weeks in training as an operator on the tuber 1 machine with Hall. Supervisor Wade asked Hall how Fagundes was doing. Hall told Wade "he didn't really give it his best shot to get in and learn." At the trial, Hall expressed the opinion that the desire of Fagundes had changed after Fagundes was promoted to the operator's position because Fagundes began to ask Hall questions about the machine. However, Hall did not talk with any supervisor regarding the change in his opinion.

In January 1983, Fagundes began attending a class at the College of the Sequoias in Visalia, California. He began studying to be an emergency medical technician. The class was scheduled to be held from 6 to 10 p.m. on Tuesdays from January to May 1983. No absences from class were permitted because a certain number of hours of training are required in order for a person to be certified in the EMT position. Fagundes acknowledged at the trial that his desire was to acquire a certificate as an EMT, and he had planned to leave his employment with the Respondent after he had achieved EMT status and obtained a job in that capacity. About the beginning of January 1983, Fagundes informed Plant Superintendent Robert Pease that Fagundes was attending the EMT class. At that time Fagundes asked Pease about the defi-

nition of a medical term which appeared in one of Fagundes' textbooks.

When Lamar Barnes went on vacation in January 1983, Fagundes filled in for Barnes as an operator on the tuber machine. At the time, Fagundes was the senior shafter.

Introduced into evidence as General Counsel's Exhibit 9 was a copy of the Employer's evaluation of Fagundes' job performance during the week of January 24-29, 1983. The evaluation was made by Supervisor Wade. The form indicates ratings of "below average" in the categories of "Attitude/Initiative" and "Job Awareness and Capability to Perform Job." Fagundes' strong point was stated to be that he "shows up for work on time." His areas requiring improvement were stated on the form to be: "Set-up procedures; takes twice the time to set-up machine. Shows little initiative to get the job done. Does not control or lead his crew. Uses very little common sense when trying to find what the causes are to problems he encounters. Production has been cut in half when Fagundes runs machine."

*B. The Events Pertaining to the Change in the
Employment Position of Fagundes on February 7,
1983*

In June 1981, meetings were held by the Respondent with its employees for the purpose of explaining the Company's new promotion policy, which became effective on July 1, 1981.

According to Plant Superintendent Robert Pease, the 30-day probationary period applies when an employee goes into an entry level job. Afterwards, there is no 30-day probationary period as the employee moves up the line of progression. Pease said that the Company's promotion policy was posted on the bulletin board.

Introduced into evidence as General Counsel's Exhibit 20 were copies of pages 1 and 7 of the Respondent's "Hanford, California, Plant Rules and Regulations, Equal Employment Policy," dated July 1981. Page 7 pertains to "Promotions." The headings of other sections on pages, which were not included in the exhibit, are set forth in the parties' stipulation. The section entitled "Promotions" states:

The Company will afford an opportunity for promotion to higher base rated jobs that have been newly created or become permanently open in the Plant. When filling a permanent vacancy other than Entry Level Jobs, the Company shall post appropriate notice for 24 hours advising of such vacancies.

If an employee has the ability and qualifications and wishes to be considered for the promotion, he or she should sign the notice posted on the bulletin board advising them of the vacancy. When the qualifications and ability of two employees who wish to be considered for the promotion are relatively equal, Seniority shall prevail. The Company shall be the judge of an employee's qualifications.

When an employee is selected for a promotion, he will be granted a Trial period of up to a maximum of thirty (30) days. If, during this Trial period

Management determines that the employee is unsuited for the job, he will be returned to his old job without loss of Seniority.

When no qualified employee indicates a desire to fill a job vacancy or when trained personnel are required or available, these positions will be filled from other sources.

The parties stipulated that there were documents promulgated by the Company on or about July 1, 1982, and July 1, 1983, with the same title as General Counsel's Exhibit 20. Those documents contained the same subject headings and the same "Promotions" policy as set forth in General Counsel's Exhibit 20. The 1980 document promulgated by the Company contained the sections and headings, as reflected in General Counsel's Exhibit 20, but the 1980 document did not contain any of the language on "Promotions."

When Lamar Barnes did not return to work from his vacation, Supervisor Wade attempted to contact him. On Wednesday afternoon, February 2, 1983, Wade spoke with Barnes' wife who informed Wade that Barnes had gone back into the Navy and that Barnes would not be working anymore for the company.

The next day, Thursday, February 3, 1983, Wade talked with Fagundes where Fagundes was working at the tuber 4 machine. Wade told Fagundes that "his chance had come, he was going to become an operator." Wade told Fagundes that he would be promoted to the operator's job and that Fagundes would be required to work the night shift. Fagundes replied that he did not want to work on the night shift. Wade said that Fagundes would have to do so and explained to him, "I'm sure a lot of people don't want to go nights, but we have to have somebody to do the job on nights." At that point Fagundes told Wade that he was attending school, and Wade suggested that Fagundes might be able to arrange a swap with Helmuth so that Fagundes could remain on the day shift until his school was over. Wade also told Fagundes that the job was in his line of progression, and that Fagundes had to accept the promotion to that job. At the trial, Wade explained that Fagundes had to go on the night shift because Fagundes was the junior operator. Helmuth, who had been an operator on the night shift, wanted to change to the day shift. Wade denied that he had told Fagundes that Fagundes would be on a 4-week probationary period, but Wade said that he did tell Fagundes that Wade would fill out a probationary progress report on Fagundes and, "I told him that he had 30 days to get in there and do the job."

Prior to his promotion to be an operator on the tuber 1 machine, Fagundes had held the position of being a shafter on the tuber 4 machine. When Lamar Barnes had begun his vacation in January 1983, Fagundes acted as an operator on the tuber 4 machine. Before Fagundes was promoted to be an operator on the tuber 1 machine, Helmuth and Hall were the operators on different shifts on the tuber 1 machine. The Employer's day shift went from 7 a.m. to 3:30 p.m., and the Employer's night shift went from 3:30 p.m. to midnight. Fagundes asked Helmuth to trade work shifts with him because Fagundes was attending school on Tuesday nights. Helmuth, how-

ever, refused to do so. Helmuth explained at the trial, "No, because I wanted to get back on the day shift."

On February 3, 1983, Horace Herring was a puller. He was changed from the day shift to the night shift. Wade explained at the trial that Herring became the junior shafter when Fagundes was promoted to operator. The senior shafter, who had been working on the night shift, wanted to change to the day shift. Therefore, Herring was changed from the day shift to the night shift to work as a shafter.

On Friday, February 4, 1983, there was a conversation between Fagundes and Plant Manager Wellford Garrett. Fagundes testified, "I asked him what would happen if I declined the job position as tuber operator, and he told me I wouldn't have a job." Fagundes asked Garrett why, and he was told "because I was—I was next in line of progression."

Fagundes acknowledged at the trial that he began the job of being an operator with the feeling that the Company was out to get him. In Fagundes' view, he had insufficient prior training and experience on the machine in order to operate it properly, and the Company was putting him into that job in order to fire him. Fagundes asked Wade if he could return to the shafter's job, and Wade told him, "No, you can't go back." During one conversation between Fagundes and Wade, Fagundes told Wade that it did not matter what he did because they were out to get him. According to Wade, he replied, "That's not true, John. All you have to do is do your job and you will have no problem."

Fagundes became an operator on the tuber 1 machine on Monday, February 7, 1983. He worked in his new job classification for only 1 week before he chose to take a 2-week vacation from Monday, February 14 to Monday, February 28, 1983. During that 2-week vacation, Fagundes unsuccessfully sought employment with other employers.

Davis was the supervisor of Fagundes while Fagundes was working as an operator on the tuber 1 machine on the night shift. Davis described the tuber machine as one that "takes rolls of paper and converts them into a tube which can be bottomed into a cement bag."

Davis described the duties of a tuber machine operator as follows: "He watches the machine and makes sure it makes good bags, makes adjustments on the machine, keeps glue in the pans, sets the machine up along with the crew. It takes three people to run the tuber." The other two jobs besides the operator are the stacker and the shafter. Davis said that a shafter "Shafts roll of paper. . . . That means he takes a metal shaft, puts it in the roll, puts it on the machine. That's one of his job functions. . . . Well, he does the same as the operator. He checks the bag, helps set the machine up, makes adjustments when needed, helps spread the machine, puts the glue in the pans." Davis said that a stacker stacks the bags after they come from the tuber machine.

Davis further explained with regard to the tubes, "They are closed by a different machine called the bottomer, which folds the bottom and puts glue on it and seals it."

The tuber 4 machine makes a different type of bag, which Davis described as being a "sewn open mouth. . . . They have gussets, and [there are] spots in one end, and they are sewed across the bottom."

With regard to comparing the complexity of the tuber 1 machine with the tuber 4 machine, Davis said, "It's more modern. I would say it's a bit more complex, but it's a lot more easy to work with." Helmuth has worked as an operator on all four of the tuber machines. For the past 2-1/2 to 3 years, Helmuth has been an operator on the tuber 1 machine. In his opinion, the tuber 1 machine is more difficult to operate than the tuber 4 machine. In Helmuth's opinion, the tuber 1 machine is easier to operate than the tuber 2 machine because the tuber 1 machine is a newer machine. In the opinion of David Hall, who has worked as an operator on both the tuber 1 machine and the tuber 4 machine, the tuber 4 machine is easier to operate. In Fagundes' opinion, the tuber 1 machine is a more difficult machine to operate than the tuber 4 machine.

C. The Events Pertaining to the Written Warning to Fagundes on February 9, 1983

Introduced into evidence as General Counsel's Exhibit 12 was a copy of the Employer's "Rules of Conduct" applicable to its employees. The parties stipulated that these rules have been in effect since 1979 when the plant opened. Among other things, the plant rules are listed as "Group I" rules, for which the discipline for a first offense is discharge, and "Group II" rules, for which the discipline for the first offense is a written warning. The discipline for a second offense against "Group II" rules is another written warning and a layoff. Discharge is the discipline for a third offense. Rule number 2 under the "Group II" category is "Leaving the department or building during working hours without receiving permission from the Foreman or the Superintendent's office."

There were two earlier occasions when Fagundes had left work at the Respondent's plant. On both of those occasions, Fagundes had permission from his supervisor to do so. Sometime in 1981, Fagundes became ill while he was at work. Fagundes testified that he spoke with Supervisor Nowak. He told him, "That I didn't feel good and, you know, I wanted to go home. And he said he could see that I didn't feel good, he told me to go home." Sometime in 1982, Fagundes told Wade that he had an appointment to visit an eye doctor, and had to leave work early. Fagundes testified, "I think he asked me what time I'd be back because I came back later on, and he asked me what time, you know, how long I'd be gone, and I told him. And he said 'okay.' I think that was it."

On Monday, February 7, 1983, Fagundes spoke to Plant Superintendent Pease about leaving work. Pease told Fagundes to talk with his supervisor. Fagundes then spoke with Supervisor Wade, and Wade told Fagundes to talk to his supervisor. Fagundes next spoke with Supervisor Davis and told him that he had to leave work early on Tuesday in order to attend his night class.

On Tuesday, February 8, 1983, Fagundes again spoke with Supervisor Davis. According to Fagundes, Davis told him that Davis did not have anyone to replace Fa-

gundes and that Davis did not know what he was going to do.

Fagundes designated the shafter on the machine to operate the machine in Fagundes' absence. Fagundes saw Supervisors Davis and Pete Simmons standing by the clock in the middle of the plant and walked over there. Fagundes testified:

Q. And what did you tell them?

A. I told Ed Davis I was going to leave for my class now.

Q. And what did he say?

A. He said, "I wouldn't leave if I were you." And then I said, "Well, I got to go." And he said, "Well, like I said, I wouldn't leave," and then I turned and walked away.

Q. What did you think he meant when he said, "I wouldn't leave if I were you."

A. It seemed like he was testing me, you know, to see if I would really or not.

Q. And you were going to show him that you were going to leave.

A. Yes.

Q. So you walked out and punched out.

A. Well, I walked over to the machine and I filled out my card for that day and then I—then I punched out.

Q. What did he tell you as you were leaving?

A. He told me that I should call Bob Pease at 11 o'clock tomorrow.

. . . .

Q. So at the time you left, you understood that you did not have permission to leave.

A. No, I didn't understand that.

Q. What did you understand?

A. I just—I just understood that he—it seemed like he was testing me, you know, to see if I would leave or not. He never came out and said I couldn't leave.

Q. You knew he didn't want you to leave, though.

A. Yes.

Q. And he didn't have a replacement.

A. No, I didn't know about that. He just said he didn't know what he was going to do.

Q. Well, you knew he didn't have anything lined up through—at that point, that he didn't have any—he didn't know what he was going to do, at least.

A. I didn't know what he was going to do, no.

Q. And he didn't—he told you he didn't know what he was going to do to replace you.

A. Yes.

As a result of the foregoing, Fagundes formed the opinion that the Company was going to terminate him.

Fagundes acknowledged at the trial with regard to Davis' comments to him, "No, he never came out and said I had permission. No."

The next day Fagundes telephoned the plant and spoke with Plant Manager Garrett, who informed him that Plant Superintendent Pease was off that day. After Fagundes arrived at the plant, he had a conversation

with Garrett and Davis. Garrett asked Fagundes whether he wanted a full-time job or a part-time job. Fagundes replied that he wanted a full-time job. Garrett asked what he was going to do about it, and Fagundes informed Garrett that the previous night had been his last class and that he had dropped out of the course. Garrett said, "Okay." Davis told Garrett that Davis had told Fagundes not to leave, and Fagundes told Garrett that Davis had said that Davis would not leave if he were Fagundes. According to Fagundes, Davis "said that he told me not to leave. And he said that him telling me that he wouldn't leave if he were me meant not to leave." Fagundes responded that he had not taken that meaning of what Davis had told him, and that Davis "should have just come right out and said 'Don't leave.'"

Introduced into evidence as General Counsel's Exhibit 3 was a copy of the Employer's "Record of Discussion," which is dated February 9, 1983, and which pertains to Fagundes. The document was prepared by Davis and signed by Davis and Fagundes. The document indicates that it is a written warning. It states as the "Reason for Conference" that Fagundes left work after being told not to do so. Fagundes' comments on the form were that he did not realize that he was not excused from work. Davis' comments on the form were that, if Fagundes left work without permission, he would assume that Fagundes had quit, and that Fagundes was a full-time employee and not a part-time employee. The "Action Taken" shown on the form is "written warning." It was stipulated that Fagundes received a copy of General Counsel's Exhibit 3.

Introduced into evidence as General Counsel's Exhibit 6 was a copy of a "Record of Discussion" prepared by Davis. It is dated February 8, 1983, and it relates Davis' version of his conversation with Fagundes on that date with regard to Fagundes' request to leave work early that day to attend school. The document itself is not alleged to be a warning given Fagundes in violation of Section 8(a)(1) of the Act. Instead, General Counsel's Exhibit 3, which is dated February 9, 1983, is the warning in issue with regard to this matter.

Fagundes acknowledged at the trial that he was the only tuber operator who was working on the night shift on February 8, 1983, and that there was no other tuber operator available to replace him that night.

Introduced into evidence as General Counsel's Exhibit 10 was a copy of the Employer's evaluation of Fagundes' job performance during the week of February 7-11, 1983, prepared by Davis. The form indicates "below average" ratings in the categories of "Attitude/-Initiative" and "Job Awareness and Capability to Perform Job." Davis indicated his view on the form that Fagundes had no strong points. As to the handwritten notations under the heading of "areas requiring improvement" the photostat submitted in evidence at the trial is not clear.

D. The Events Pertaining to the Verbal Warning to Fagundes on March 4, 1983

Introduced into evidence as General Counsel's Exhibit 7 was a copy of the Employer's "Record of Discussion," dated March 4, 1983, pertaining to Fagundes. The docu-

ment was prepared and signed by Davis. It indicates that a verbal warning was given. The "Reason for Conference," as shown on the form, was that Fagundes had run two pallets of approximately 6000 tubes with "no spots." Fagundes' comment, as shown on the document, was that he was checking them. Davis' comments on the form were that he told Fagundes that he had better start watching the tubes more closely, and that there was no excuse for running that many bad tubes. Davis also commented on the document that Fagundes had run bad tubes every day that week with "no spots, no slits, stuck, etc." Davis' further comments on the form were that Fagundes had been told that this would not be tolerated.

At the trial, Fagundes acknowledged his mistake in producing approximately 6000 tubes with no spots. Fagundes also acknowledged that the glue trays had run low and that some of the bags did not have glue spots on them. He said that the method for reclaiming those bags was that "people have to go through by hand on each bag and put glue in it where it needs it."

Introduced into evidence as General Counsel's Exhibit 11 was a copy of the Employer's evaluation of Fagundes' job performance during the week of March 4, 1983, prepared by Davis. The form indicates "unsatisfactory" ratings in the categories of "Attitude/Initiative" and "Job Awareness and Capability to Perform Job." Davis has notations attached to the form that:

John is not able to run #3 tuber. He has no experience and no ability on this machine. *Just waste.* 3-4-83 John had trouble with set-up. After scoping out the situation, I found he forgot to set main drive gears to correct size. He had already broke the paper stimes. [Emphasis added.]

As to his strong points, Davis indicated, "John is not afraid to run the machine at a high rate of speed. (Tubes aren't always good)." As to areas which required improvement, Davis indicated, "John needs work on running good tubes. He watches closely but he's not sure how to fix most problems yet. John needs to improve his ability to make people work for him. Sometimes I think he just doesn't take his job serious."

E. The Events Pertaining to the Written Warning to Fagundes on March 9, 1983

The parties stipulated that on March 9, 1983, Fagundes spent 2 hours finishing an order which had been begun on the day shift. In completing that order, Fagundes ran 8779 units. He then had 3 hours of setup time for another order. He spent 3 hours running that order, and he ran 14,154 units.

Fagundes acknowledged at the trial that he had a problem with "loose walls" on bags he had run on March 9, 1983. After his machine had been running for an hour or 2 hours, the stacker told Fagundes about the problem with the loose walls on the bags. Fagundes said that he tried to correct the problem by making different adjustments and by slowing the machine, but later some bags still were being produced with loose walls. He spent about 15 minutes doing the foregoing adjustments. Then Fagundes asked Davis for help. Fagundes testified:

A. I asked him for help at one point. And he told me I should know how to do it. And he let me do it myself. He told me I should know how to fix it by now. And he left and he left me there to try to solve the problem. And he came back later, and I still had the problem, which I had the machine running slow, and I was still trying to fix it.

And he just went over there, and he made an adjustment and got rid of it.

Fagundes estimated the time lapse between the time he spoke to Davis and the time that Davis returned to be 15 or 20 minutes. After Davis made the adjustment, Fagundes said, the problem did not recur.

Introduced into evidence as General Counsel's Exhibit 4 was a copy of a "Record of Discussion," dated March 9, 1983, pertaining to Fagundes. It was prepared by Wade and signed by him. It indicates that it is a written warning, and gives as the "Reason for Conference" the following: "Poor performance, excessive waste, poor production and lack of concern for the job." Fagundes' comments on the form were that he was doing everything that he could do, and that he looked at the bags all the time. Wade's comments on the form were that Fagundes' attitude was very poor; that Fagundes did not seem to care about the quality of his performance as a tuber operator; that his poor production and high waste were costing many dollars; that the cost of producing bags rose when they had to reclaim bags made by Fagundes; that when Fagundes went on vacation and Villanueva ran the machine most of the problems with the bags disappeared, although Villanueva had been in the tubing department a shorter period of time than Fagundes. Wade indicated on the form that he had asked Fagundes if he wanted to be an operator, and Fagundes had replied "yes." Wade asked Fagundes why he did not do a better job, and Fagundes replied that he did not know. Wade also stated on the form that he told Fagundes that this was a written warning and, if Fagundes did not improve, he would no longer be an operator.

At the trial, Wade explained that he had heard rumors as of March 9, 1983, that, if Fagundes was terminated by the Company, Fagundes would take the matter to court. As a result of those rumors, Wade said that he told Fagundes, "I'm not afraid to go to court, but you're going to do the job. That's the only thing I ask of you."

It was stipulated by the parties that Fagundes received a copy of General Counsel's Exhibit 4.

At the trial, Fagundes said that he had checked the bags on that occasion "about every half hour" until he realized that he was producing bags with loose walls. Fagundes said that 30 minutes was the minimum time for an operator to check the bags. He stated, "You could check them more frequently. I mean, I didn't check exactly half hour. It could be 20 minutes, 40—." After Fagundes became aware of his problem in producing bags with loose walls, he said, "I did check more frequently."

According to Davis, an operator is supposed to check the bags coming out of the tuber machine every 2 or 3 minutes. Every 30 minutes an operator signs the back of his timecard and checks a completely folded bag.

As to how often an operator is supposed to check the bags, Helmuth stated, "There's no set time. I check the bag about every—sometimes I will go up to 5, 10 minutes without checking a bag, but I try to [do] more than that. I usually do it about every couple of minutes, I try. I'm usually standing right there, though, unless I'm off doing something else."

The next day, March 10, 1983, Fagundes had a conversation with Davis and Wade. Fagundes testified:

A. I was—we were setting up a machine. It was an hour after I came in, about 4:30, and we were setting up the machine. And Ed Davis came out, and he said, we're going to go to the office, and he took me into Jim Wade's office, and Jim Wade, he told me that I was making too many bad bags and my set-up time was too long, and that I had to do a better job.

And he was telling me how David Villanueva had operated the machine, the same machine I was operating while I was on vacation, and how he had done a better job than I did. And he said I should be able to do a better job because I had been there longer than Villanueva had.

And I told him that Villanueva has been on the machine longer than I have and, you know, but he said, again, that I'd been with the company longer, and I should know how to run it. And he said I had to do better, or I'd be out the door.

According to Fagundes, the bags with the loose walls were interspersed with good bags. He explained at the trial, "Because every, every bag wouldn't be bad. There'd be good ones, then bad ones, good ones. That's why they had to reclaim them. They had to go through by hand and sort the bad ones from the good ones."

Tom Emerson, who was the bottomer supervisor, called Wade's attention to the bags which Fagundes had produced with loose walls. As a result, Wade and Pease went through the 14,000 bags and pulled out those bags which had loose walls. Wade estimated at the trial that there were 6000 to 7000 bags with loose walls. He said the loose wall bags were interspersed with the good bags. Wade stated, "It was a problem that came and went." Wade estimated that it took them 3 to 4 hours to go through the bags Fagundes had produced and locate the bags with loose walls. Wade stated that nothing can be done to reclaim bags with loose walls, and such bags are turned into waste. According to Wade, other than the incident involving the application of Stack-Aide on the bags by Villanueva, there have not been any incidents, in which bad bags had to be destroyed, of a larger number of bags than had occurred with Fagundes.

F. The Events Pertaining to the Termination of Fagundes on March 10, 1983

Wade said that he recommended to Plant Superintendent Pease Fagundes be terminated. At the trial, Wade gave as the basis for recommendation the following:

Well his continuing lack of attitude in running the machine. With the ability he had, he could do

the job, but he wouldn't do it and kept running waste, and then when [he] ran that excessive amount of tubes that we couldn't save, then I—I had reached the end of my rope, so I recommended we terminate.

Pease said that he was the one who made the decision to terminate Fagundes on March 10, 1983. With regard to the meeting at which Fagundes was terminated, Pease testified:

A. John came in, and it was John, Supervisor Wade, and myself. I—I told John that we were terminating him and—for poor job performance. And John didn't have any comment at that time, didn't say anything. And he—I explained the card to him. I was filling out the termination card, and I explained it to him, and let him read it. He read it, and I indicated that if he felt that—if that, you know, if there was any reason that he didn't agree with that, why, then there was an area in the card that he could fill out. And he said, "No. It's been nice knowing you." I—it's a . . . it's not a very nice moment. I don't really care for those things. I indicated to John—I'd worked with this man for—for some time. I indicated to him that—that he could—that I had heard that he was looking to drive—a job driving an ambulance. And he indicated, I believe, by nodding his head. And I said, "Maybe you can pursue this job then." And I think he said, "Maybe."

Pease acknowledged at the trial that Fagundes' earlier difficulty in getting along with Horace Herring was not relied on in terminating Fagundes. Pease agreed that that matter was "water under the bridge." Similarly, Fagundes' interactions with other employees were not discussed in making the decision to terminate Fagundes.

Introduced into evidence as General Counsel's Exhibit 5 was a copy of the Employer's "Record of Discussion," dated March 10, 1983, pertaining to Fagundes. The document was signed by Pease, Wade, and Fagundes. It was stipulated by the parties that Fagundes did not receive a copy of the form. The "Reason for Conference," as set forth on the document, was "unsatisfactory job performance." Fagundes' comments, as shown on the document, were: "OK, it's been nice knowing you." Pease's comments, as shown on the document, were:

John was told that we could no longer tolerate his mistakes as an operator. John was told that not only his Supervisors but the people he worked with and directed felt he had a "don't care" attitude. This attitude was most evident on 3/9/83. John ran 14,000 bags. Approximately 6,000 bags were thrown away with loose walls. This was one incident. There have been others just as costly.

"The Action Taken" set forth on the document was "termination effective 3/10/83."

Introduced into evidence as General Counsel's Exhibit 8 was a copy of the Employer's "Record of Discussion," dated March 10, 1983, pertaining to Fagundes. It was

prepared and signed by Wade. "The Reason for Conference," as shown on the document, was: "poor job performance, ran approximately 6100 bad tubes, 4200's of waste." The comments of Fagundes, as stated on the form, were: "I watched the bags. Saw nothing wrong. I guess it's OK. It's been nice knowing you." Wade's comments, as shown on the form, were:

After giving John a written warning about his job performance on 3-9-83, he ran 14,000 tubes of which 6100 of them had loose walls and were un-useable. When asked why he ran the bad tubes, he replied, "I don't know." He was then told that Chase Bag could no longer afford his mistakes, and he was being terminated. He just smiled and said, "OK." When Mr. Pease showed him [his] termination card, he signed it and chose not to disagree in writing with the reason for termination. Mr. Pease made [a] point of telling him he could disagree with the reason for termination by filling in his reason at the bottom of the card and sign it. Fagundes chose not to!! I then told John that if things were going to get better for him in pursuing a career that he would have to change his attitude towards performance of any job he may choose to take. He then shook my hand and said, "It's been nice knowing you."

General Counsel's Exhibit 22, which is the Employer's employment record for Fagundes and which has been referred to earlier in section V,A herein, indicates that on March 10, 1983, Fagundes was "discharged, unsatisfactory job performance."

Introduced into evidence as General Counsel's Exhibit 16 was a copy of the Employer's form entitled "Termination of Employment," dated March 10, 1983, pertaining to the termination of Fagundes. The reason for his termination, as stated on the document, is "unsatisfactory work performance." The document is signed by Pease. Underneath Pease's signature is printed, "I agree with the above statement of the termination of my employment." Underneath that printed wording is Fagundes' signature. Underneath that is printed: "EMPLOYEE PROTEST— If the employee disagrees with the above statement, he should write out and sign his own account of the reason or cause of the termination of his employment." The foregoing printed statement is distinguishable from other printing on the document in that it has double lines above it and beneath it. The lines are close together and heavier than the other lines on the document. Underneath that wording is printed, "the reason for the termination of my employment is." Thereafter are blank spaces and a place for the date and signature of the employee.

G. The Events Pertaining to Certain Other Employees

1. Leo Acevedo

Leo Acevedo, a tuber operator at the Respondent's plant, served a 30-day probationary period which he passed. Hall, recalling at the trial that he had one conversation with Acevedo regarding his job performance,

testified, "His basic problem was that he didn't listen well, or if he listened, he wasn't listening close enough to, you know, like when you showed him something, he may not have been watching as close as he should have." As a result, Hall said Acevedo had made a few bad bags. Hall explained at the trial, "He made a few, not to the point where it was an excessive amount, but he did have a few, yes."

At the time of the trial, both Helmuth and Acevedo were working as operators on the tuber 1 machine, but they worked on different shifts. Acevedo had become an operator after Fagundes had been an operator. Helmuth was of the opinion that Acevedo was still in training "because he doesn't appear to know the machine good enough to not be in training." Helmuth said that he would have to correct adjustments on the tuber 1 machine when Helmuth came into work after Acevedo had operated that machine. Helmuth also observed bad bags that had been produced by Acevedo. As to the quantity of such bags, Helmuth said that there were "sometimes a pallet or more." Helmuth said that, recently prior to the trial, Acevedo had run about 3000 bags with loose walls.

2. Ron Branson

The parties stipulated that Ron Branson went from the position of a baler/stacker to a bottomer/feeder or helper on October 22, 1979. The parties further stipulated that on May 18, 1981, Branson went from the position of bottomer/feeder to the job of paste cooker.

3. Tim Branson

Introduced into evidence as Respondent's Exhibit 6 was a copy of a "multiwall Probationary Personnel Progress Report" for Tim Branson. The report is for the week of August 16, 1982. The report lists Branson's position as "press helper," and the report indicates that it was for the first week of Branson's probationary period.

4. Linda Cockran

Introduced into evidence as Respondent's Exhibit 12 was a copy of the Employer's termination of employment which pertains to Linda Cockran. The document is dated September 22, 1981, and it indicates the Employer's reason for the termination of Cockran was "does not maintain production required. Does not adhere to quality standards."

5. Sheila Combs

Introduced into evidence as Respondent's Exhibit 15 was a copy of the Employer's termination of employment which pertains to Sheila Combs. The document is dated December 6, 1979, and it indicates the Employer's reason for the termination of Combs was "job performance and absenteeism."

6. Kemp Conley

Introduced into evidence as Respondent's Exhibit 11 was a copy of the Employer's termination of employment which pertains to Kemp Conley. The document is dated August 3, 1979, and it indicates the Employer's reason for the termination of Conley was "because of in-

efficiency. By not taking his job seriously, and horse playing around during working hours. I have talked to him several times about his problems. Did not see any change in his work. My decision is to terminate him." Plant Superintendent Pease believed that Conley had worked for the Company for possibly 2 or 3 months. Conley worked in the press department.

7. Charles Garcia

The parties stipulated that Charles Garcia signed on December 10, 1981, a document whereby he passed up a job of tuber helper in favor of Tim Vandermoren.

Prior to his testifying at the trial, Wade weighed two of the roll shafts. He said they weighed 84 lbs. and 94 lbs. These were shafts from the tuber 1 machine and the tuber 4 machine. The tuber 1 shaft was the heavier.

Wade said that he had assigned Charles Garcia temporarily to the roll shafter's job, but Garcia "was unable to handle the shafts. They weigh too much for him." According to Wade, Garcia "was trying, but he couldn't handle it. He dropped the shafts a couple [of] times and almost lost his balance in the machine."

With regard to permitting Charles Garcia not to move into the shafter position, Pease said he had explained Garcia's situation to Fagundes. Pease testified:

A. I told him that Chuck is physically unable to handle the helper job. Chuck is a stacker. And I told John that he— I'm sure that John knows this and understands it, Chuck is not physically able to lift—there's some shafts, they're called roll shafts. You stick 'em through a eighteen to two thousand pound roll. They set in a cradle. When the paper runs out, you're required—the roll shafter is required to physically lift the shaft out of the cradle in a standing leaning position, turn, move out of the cradle area into a rack where you lay it down. Chuck had attempted to—to do this, and he indicated to us that it was a little bit too much for him. It was obvious to us that—was the case. We were—were fearful that—that if we allowed him to do it, he was going to damage himself.

8. Fred Gilbert

The parties stipulated that on November 26, 1979, Fred Gilbert went from the job of baler/palletizer to the job of bottomer/helper.

9. Robin Gilbert

Introduced into evidence as Respondent's Exhibit 17 was a copy of the Employer's termination of employment which pertains to Robin Gilbert. The document is dated October 16, 1979, and it indicates that the Employer's reason for the termination of Gilbert was "absenteeism [and] attitude towards her employment and people around her." Pease said that Gilbert had worked in the bottomer department.

10. Pedro Gomez

Introduced into evidence as General Counsel's Exhibit 17 was a copy of the Company's employment record for Pedro Gomez. At the trial, Pease acknowledged that the job of baler/palletizer was not in the line of progression for Stand-Open-Sack (SOS) operators, which Gomez had been. Pease explained at the trial.

A. No, it wouldn't have been. Maybe I can best explain to you and kind of give you some, some background.

Pete Gomez, his home was in Corcoran, which is 17, 18 miles from our plant. He had a problem with getting to work. We counseled Pete, talked to him on a number of occasions, and at one point told him that if he did not come to work—he had moved up through the ranks to an SOS operator—if he did not come to work, we were going to have to terminate him. We felt that Pete was a hardship case. This was a man that was attempting, making a very strong attempt to get to work, at some time he would walk to work. Get halfway, his car would break down, he would walk. He told me, he said, "look, I know that I'm not gonna be able to keep this job because I can't get to work. I am looking for other employment in Corcoran." And he asked me if I would allow him to go to a baler/palletizer out of the—he did not regress the same way he came up. He went completely out of the SOS area to a baler. His wages were reduced. And if I would allow him to stay there until he got another job. There was a two month period there while he was looking, and I allowed him to do this, yes. There was a two month period that he was looking. He found employment and terminated his employment.

11. Ralph Gonzales

Introduced into evidence as Respondent's Exhibit 9 was a copy of an authorization for a payroll change pertaining to Ralph Gonzales. The document is dated June 23, 1981, and indicates that Gonzales was moved from the job of baler/palletizer to press helper. According to Pease, both the baler/palletizer job and the press helper job are entry-level jobs in a line of progression. On August 10, 1981, Gonzales returned to the baler/palletizer job, which was a demotion. (See the parties' stipulation at Tr. 128 and 402.)

Pease explained at the trial:

We allowed him to go back, we didn't put him back. Shortly after—again, the opening was on [the] night shift, and Mr. Gonzales went to nights. And shortly after that, he approached me and said that he felt that he was going to have to terminate himself, and I asked him why. He said that since he had went on nights, he—it was some—a problem with his home and his family, there were some people hanging around his house, and he was very concerned about 'em. And I indicated to Mr. Gonzales that I didn't—wasn't really interested in seeing him terminate himself, a very good man, from a work standpoint and other points. He—I indicated,

"Maybe you can work it out," and he said that he would make an attempt. And he—evidently, he did. He was unsuccessful. He came back to me and then—and told me this, and asked if I would put him back on baler, back into the entry level job, because if I was not able to, he would terminate. The problem was that serious with his home that he would give up his progression and pay to go back. And I allowed him to do that.

On January 15, 1982, Gonzales passed up an SOS baler position, which is a bid job. Gonzales bid on that job, but he decided he did not want the job. He told Pease that he wanted his name withdrawn. Therefore, Gonzales did not hold the job of SOS baler and did not enter that line of progression.

On August 4, 1982, Gonzales again passed up an SOS baler's job, which is a bid job. Gonzales was asked if he wanted the job, and he said he did not. Pease said the Company had Gonzales sign a paper to that effect. At the time, Gonzales was not in a line of progression. Pease said three other employees had signed similar papers. He identified the other employees as being inspectors Evelyn Balan and Lena Loquette and employee Charles Garcia.

12. David Hall

Hall was the most senior shafter at the time he was promoted to be an operator. He was assigned by the Company to operate the tuber 1 machine. He believed that he was placed on a probationary period of about 30 days, but he was not told that, and he was not told what would happen to him if he did not pass a probationary period. He acknowledged at the trial that, when he was an operator, he had made at the most 2000 bad bags at one time. He was written up for doing so, but he was not terminated by the Company.

Introduced into evidence as General Counsel's Exhibit 15 was a copy of a "Record Discussion," dated March 31, 1983, pertaining to Hall's work as a tuber operator. The "Reason for Conference," as shown on the document, was "3 pallets of tubes with side slitter missing." Hall's comments, as shown on the document, were: "I should have caught it. I messed up." The comments of Supervisor Wade, as shown on the document, were: "I told Dave that due to the location of the slitter you should have seen it right away. We were able to save the tubes by diamond o-ing the end with the missing slitter. Talk less to stacker and watch the bags more carefully." The "Action Taken" portion of the form states "discussion only." (See also the parties' stipulation at Tr. 116.)

13. Fred Hansen

According to Fred Hansen, the line of job progression in the bottomer department is stacker, feeder, and then operator. Hansen worked as a palletizer for 3 months in his initial job with the Respondent. Then he worked as a bottomer helper.

Chuck Yeople is the one who informed Hansen just before the start of a work shift that Hansen was to work as a bottomer operator. Hansen told Yeople that he did

not want the job, but Yeople told him that Hansen had no choice. Hansen asked why he was being promoted to the operator's position when he had no experience in operating the machine and just barely enough experience to know what the machine did. Hansen told Yeople that Fred Gilbert, Bill Jackson, and Ronnie Bronson, who were bottomer feeders, had more experience and more seniority. Yeople told Hansen than none of them wanted the job.

Hansen began working on October 6, 1980, as a bottomer operator. It was 3 months later before Hansen learned that he was serving a probationary period. Hansen was informed at that time in a meeting with Supervisors Tom Emerson and Davis that he had passed his probationary period. Hansen testified, "Even Tom Emerson said it was wrong for putting me in there, but he had no choice since nobody else wanted the job, nobody else had the mechanical ability to learn the machine."

Hansen continued to fill the bottomer operator's position under Supervisor Davis who, in Hansen's opinion, "was very, very lenient." Davis spoke with Hansen at least once a week during Hansen's first 6 months as an operator, and Davis told him that Hansen should learn the machine; should realize when he encountered a problem; should have less downtime; should spend less time on setups; and should be running the machine faster.

After Hansen had been a bottomer operator for several months, Hansen went to Plant Manager Wellford Garrett and asked to be put back in his former job of bottomer feeder or in another position in the plant. Hansen testified:

Ed Davis had just pushed me too far. He was telling me to run the machine almost as fast as it would go at times, and then we'd still be putting bad bags out, yet he would not want me to fix it right. He would want me to run the machine very fast, and the inspectors and stackers would not have enough time to stack the bags or pull the bad bags off. They would just have to stack 'em on the floor.

Garrett told Hansen that he would talk with Supervisor Emerson. The following day, Emerson spoke with Hansen and told him there were no openings in the feeder positions or in other positions, and for Hansen to try to do the operator's job "for a little bit longer." Subsequently, Emerson told Hansen that his feeder, Tim Hall, was going to be made an operator, and Hansen could fill that feeder position if he wanted to do so. Hansen became a bottomer feeder once again on May 18, 1981. (See the parties' stipulation at Tr. 127.)

Hansen acknowledged at the trial that, since meetings were held by management with the employees in June or July 1981, he understood the policy of the Company was that he would be required to move up from bottomer feeder to bottomer operator if an opening occurred for a bottomer operator's job.

According to Helmuth, Hansen was demoted from the operator's job to the bottomer feeder's job because he was not meeting the Company's production standards.

Introduced into evidence as Respondent's Exhibit 7 was a copy of a notice which was posted by the Company on November 30, 1981. The notice stated, "There will be an operator's job opening in the webber area. Those interested please sign below." The signature of Fred Hansen appears underneath that typewritten notice. He was the only one to bid on the job. However, Pease said that Hansen was not given the job by the Company because Hansen already was in line of progression at that time and not considered to be eligible. Therefore, the Company opened up bidding to everyone when the Company posted a second notice. A copy of the second notice was introduced into evidence as Respondent's Exhibit 8. Glen Magee and Kevin Thur bid on the job at that time. Magee was selected.

14. Dale Harmon

Introduced into evidence as Respondent's Exhibit 14 was a copy of the Employer's termination of employment which pertains to Dale Harmon. It is dated November 16, 1979, and it indicates the Employer's reason for the termination of Harmon was "poor job performance, Dale had difficulty keeping his mind on his job." Pease believed that Harmon had worked for the Company for 2 to 3 months before his termination.

15. Don Helmuth

When Don Helmuth was promoted in 1980 from the job of shafter to the job of operator of a tuber machine, he was the senior shafter at that time. His supervisor, Bob Nowak, told him of his promotion, but Nowak did not say anything to Helmuth about his being on probation as an operator.

Helmuth acknowledged at the trial that he had made some bad bags when he was first training as an operator on the tuber 1 machine. He described it as occurring "more frequently than I'd like to see." When Helmuth first became an operator, he ran 1500 to 2000 bags with loose walls on the tuber 2 machine. That was the largest number of bags with loose walls that Helmuth had run on one shift. Such bags were just thrown away because they were not reclaimable.

Since the termination of Fagundes, Helmuth has made more than a pallet of bad bags. He said there were between 4000 to 6000 bags on a pallet. He was given a written warning by Supervisor Wade for the incident, which involved bags being made without a "slitter." That was a correctible error according to Helmuth. Helmuth stated at the trial that the Union had told him that the Union was going to file a charge with regard to the written warning which had been give by the Company to Helmuth. As a result, about a month after he had received the written warning, Helmuth spoke with Plant Manager Garrett, who told Helmuth not to worry about it, and that he would take care of it with Wade.

16. William Jackson

The parties stipulated that William Jackson went on February 3, 1980, from the position of a baler to the job position of bottomer feeder. The parties further stipulated that on April 13, 1981, Jackson went from the position of

bottomer helper to the job of pressman in the press department on a temporary basis. Finally, the parties stipulated that on May 18, 1981, Jackson became a permanent pressman. (See the stipulations at Tr. 127-128.)

17. Glenn Magee

Introduced into evidence as General Counsel's Exhibit 19 was a copy of the Company's employment record for Glen Magee. The document shows that Magee went from the job of tuber puller to SOS operator on December 14, 1981. Pease said that Magee was still employed as an SOS operator at the time of the trial. According to Pease, the line of progression for the SOS operator position was to go from SOS helper to SOS operator. However, on December 14, 1981, there was no one in the SOS helper position. Pease explained at the trial that a job bid was posted by the Company for the SOS operator's job. Introduced into evidence as Respondent's Exhibit 8 was a copy of that document. Magee bid for that job and received it.

18. Jacqueline McAlister

Introduced into evidence as Respondent's Exhibit 16 was a copy of the Employer's termination of employment which pertains to Jacqueline McAlister. The document is dated October 26, 1979, and it indicates the Employer's reason for the termination of McAlister was "cannot perform the job (inspector's tacker.)" Pease believed at the trial that she had worked for the Company in the sew area, and that she had not worked for the company for a very long time. The plant had opened in July 1979.

19. Billy Munroe

Introduced into evidence as Respondent's Exhibit 10 was a copy of the Employer's termination of employment which pertains to Billy Munroe. The document is dated October 22, 1981, and it indicates the Employer's reason for the termination of Munroe was: "Bill could not keep up with his assigned work, and chose to go home after a discussion with his supervision on 10/22/81. A review of Bill's work record and this incident had determined his termination."

20. Gregory Pawlowski

Introduced into evidence as General Counsel's Exhibit 18 was a copy of the Company's employment record for Gregory Pawlowski. The document reveals that Pawlowski went from the pressman's job downward to the job of press helper on June 11, 1982. At the trial, Pease explained:

A. Yes. Mr. Pawlowski graduated to a pressman, and during the time he was a pressman, he was coming to work one morning and—on his motorcycle, and a truck pulled in front of him and he—he hit the truck and flew off the motorcycle and into a telephone pole. And there was extensive damage to the head area. Mr. Pawlowski was in the hospital for a number of months, not expecting to pull

through. He did. His doctor was in contact with us at that time.

And his medical doctor and the psychiatrist had been talking together. Mr. Pawlowski had some fears. The psychiatrist contacted me and said, "Look, would you be willing as an employer to help this guy out?" And based upon his past record, I said yes. He said "Mr. Pawlowski is, we feel is going to do damage to himself, unless he is put back in—he wants to pick up where he left off. That's what he remembers. And he was happy, his home life was happy, he had a good job, and so on. And we feel if we put him back into that environment, that we're going to be able to help him, and there won't be a catastrophe," they were concerned about.

We did that. The doctor indicated to me that he was fearful. We brought him back into the plant, and the very next visit, why, Mr. Pawlowski told his psychiatrist that he was fearful of the equipment, the equipment, he was scared of it. The doctor then called me and said, "Is there anything that he can do, and—because we feel he has to pick up where he left off to—for a cure." And so we put him in as a press helper. And he—we stuck him there. We talked to the crew, told 'em about Mr. Pawlowski. They accepted it because of, again, his past work record. And he subsequently had received some money from the accident, and he terminated himself.

21. David Ryburn

Introduced into evidence as Respondent's Exhibit 13 was a copy of the Employer's termination of employment which pertains to David Ryburn. The document is dated November 16, 1979, and it indicates the Employer's reason for the termination of Ryburn was: "David does not always carry his part of the work load, resulting in dissension among his peers." Pease said that Ryburn worked in the job of baler/palletizer.

22. Cecil Sellers

According to Helmuth, Cecil Sellers has received warnings since the time of the termination of Fagundes. Helmuth testified, "I know he's been written up a couple of times. I'm not sure exactly what for or anything." Sellers was still employed by the Company at the time that Helmuth testified. Sellers was an operator on the tuber 2 machine for 2-1/2 to 3 years. Then, Sellers was an operator on the tuber 1 machine, and, finally, Sellers was an operator on the tuber 4 machine at the time of the trial.

23. David Villanueva

On March 14, 1983, David Villanueva was assigned to be an operator of the tuber 1 machine on the night shift. (See the stipulations at Tr. 128 and 402, and Tr. 145.) A week or two later Villanueva asked Helmuth, who was working on the day shift, to trade shifts with him because Villanueva was going to school at night. Helmuth

and Villanueva asked Pease and their supervisors for permission to swap their work shifts. They received permission from the Company to do so, and they signed a document whereby they agreed to stay on the shift for a certain number of days. After Villanueva completed his schooling, Villanueva and Helmuth swapped shifts once again. At that time, Villanueva went back to the night shift, and Helmuth returned to the day shift. Helmuth was told by Garrett, Pease, Hall, Davis, and Wade that Acevedo was still in training at the time under Supervisor Hall, so he remained on the tuber 1 machine on the day shift for about 3 more weeks before he went to the night shift. About a month later, Supervisor Hall also was changed to the night shift.

During the time that Davis was supervising Villanueva as an operator, Davis had a verbal discussion with Villanueva regarding a mistake in applying Stack-Aide to an order of bags. Davis testified:

A. Well, we ran a C & H Sugar bag and they re-wrote the order a way they had never done it before. And actually what happened is, it said, no Stack-Aide which has special instructions, and if they want Stack-Aide on a bag, they write the word Stack-Aide in there. And if they don't, they leave it blank. Well, they had wrote no Stack-Aide in there, and I had checked off a bag and signed it and was ready to run, and it had Stack-Aide on it. But I had looked in the corner and seen just the word Stack-Aide and not really paid that much attention to what I'd read.

And I told [him] to run the machine, and he ran it, and several thousands of the bags were bad because they had this substance on them. I had talked with him about it because, you know, he had been there and read the order with me, but I had to take the blame for it because I had signed the order, and read it, and told him to run it.

Introduced into evidence as Respondent's Exhibit 4 was a copy of the California & Hawaiian Sugar Company order. At the trial, Davis acknowledged that he had examined the C & H order prior to the bags being run, that he knew that Stack-Aid was being applied to the bags, and that he had approved Villanueva's running of that order. Both Garrett and Pease spoke to Davis regarding it. Davis testified, "My job was on the line, basically, cause it was my fault that the bags were run. So the nature of it was reprimanding me verbally." Davis testified that Villanueva was not terminated, "cause basically it was my fault. I was the one that told him it was good and to run it." Davis did not give Villanueva a warning over that incident, but he acknowledged that in his written evaluation of Villanueva on other incidents he had said that Villanueva needed to read his orders more closely.

Introduced into evidence as Respondent's Exhibit 5 was a copy of a "Record of Discussion," dated March 17, 1983, pertaining to Villanueva. The "Reason for Conference," as shown on the document, is: "ran 13,000 bags with Stack-Aide (no Stack-Aide required) bags had to be thrown away." The comments of Villanueva on the doc-

ument were: "I missed it on the order sheet. I thought it said Stack-Aide instead of no Stack-Aide." The comments of Supervisor Wade on the document were: "I told Villanueva he must read everything on the order sheets carefully, and if a question arises, [then] go to his supervisor. I told David another occurrence will result in a verbal warning." The "Action Taken" portion of the document states "none."

Wade said he had also written up Villanueva for having a "poor attitude"; for failing to direct his crew; for not reading orders; and for having an untidy workplace.

Wade acknowledged that he also had written up other employees for having problems with their attitude; for failing to direct their crews; and for producing bad bags. Wade was of the opinion that experienced operators made fewer mistakes than new operators, and Wade was tolerant of new operators. At the trial, Wade gave his opinion of the difference between Fagundes' job performance and Villanueva's job performance, which, in his view, justified Villanueva's remaining as an employee of the Company. Wade testified:

I felt that David Villanueva gives a hundred and ten percent, and I could never get Mr. Fagundes up to where he would give a hundred percent, or even ninety percent. On certain days he would give ninety. On other days he would give forty. And no matter what I said or how I tried to turn him around, I just couldn't get him to do the job.

There were no written warnings or notations of verbal warnings in the Company's personnel file for Supervisor Davis.

VI. CONCLUSIONS

It has been noted several times earlier in this decision that certain matters were not alleged to be unfair labor practice violations of the Act. Those observations were made not in the sense of being critical, but instead to explain why conclusions have not been made with regard to those matters as to whether they constitute unfair labor practices. However, the findings with regard to those matters noted earlier have been considered in reaching a determination with respect to those matters which are alleged to be unfair labor practices by the General Counsel. Administrative Law Judge Jerrold H. Shapiro has stated succinctly: "The ultimate question is what was the reason for the discharge, and the presence or absence of other antiunion actions is an aid to answering the question, not an answer in itself." *Kenworth Co.*, 221 NLRB 800, 807 (1975). The Board had held "In finding a prohibited motive for a disciplinary action, independent evidence of animus is relevant but is not an essential element of proof." *Kenco Plastics*, 260 NLRB 1420 (1982), citing *Auto-Truck Federal Credit Union*, 232 NLRB 1024, 1027 (1977). Those matters which are alleged in the General Counsel's complaint as unfair labor practice allegations are summarized in the "Statement of the Case" section at the outset of this decision.

In reaching conclusions based on the findings of fact set forth in the preceding sections of this decision, it is

helpful to review the Board's holding in *Herbert F. Darling, Inc.*, 267 NLRB 476, 477 (1983), where it stated:

In proving a case of discrimination under the Act, it is the General Counsel's burden to show by a preponderance of the relevant evidence that a respondent acted in derogation of employee rights protected by the Act.⁷ The record as a whole, including the weight of the evidence, the inherent probabilities, and the reasonable inferences to be drawn therefrom, must be assessed in reaching the result in a case.

⁷ See, e.g., *Wright Line*, 251 NLRB 1083, 1088, fn. 11 (1980).

With regard to Fagundes, I conclude that the evidence shows that Fagundes was active openly in the most recent union organizational attempt among the Respondent's employees by the Union, and that Fagundes had been active in the earlier union organizational efforts by another union. Fagundes was not the only employee of the Respondent who openly supported the Union by wearing union buttons and union insignia, but Fagundes' wearing of a number of such union buttons and union insignia on his clothing at the plant was a noticeable activity, which came to the attention of the Respondent's supervisors. Fagundes also engaged in other activities in support of the Union. He continued to wear union buttons and union insignia on his clothing at the plant after the representation election in December 1982, while only occasionally did other employees of the Respondent do so after the election.

I further conclude that the evidence establishes that Fagundes' prounion activities took place prior to the personnel actions involving Fagundes in 1983, which are alleged by the General Counsel to be unfair labor practices. That is, Fagundes' union activities took place prior to his being assigned to the operator's job, prior to the warnings issued to him in 1983, and prior to his termination from employment on March 10, 1983. As indicated above, I also conclude that the Respondent's supervisors had knowledge of Fagundes' union activities prior to those events affecting his employment with the Respondent. The evidence also shows that the Respondent openly opposed the Union's organizational efforts among the employees of the Respondent, and the statements attributed to the Respondent's supervisors reveal an animus towards union organizational activities among its employees. On the other hand, the evidence also shows that David Hall and Jess Alonzo were active in their support of the Union, and that the Respondent promoted both Hall and Alonzo to supervisory positions at the plant.

Without repeating the numerous findings of fact set forth above, I reach the following conclusions with regard to the change in Fagundes' job assignment effective on February 7, 1983. I conclude that the evidence reveals that the event which precipitated the change in Fagundes' job position at that time was the voluntary quit by Lamar Barnes. That was a circumstance over which the Respondent had no control. That is, Lamar Barnes took his vacation time and apparently decided to

return to the United States Navy, rather than resume his job position as a tuber operator at the Respondent's plant. The departure of Lamar Barnes created the vacancy in the operator's position to which Fagundes was assigned, based on Fagundes' seniority and the job he held at that time. However, it was Helmuth's desire to move from working on the night shift to working on the day shift, and Helmuth's greater seniority as an operator, which resulted in Fagundes' change from the day shift to the night shift. Considering Helmuth's seniority as an operator, and his desire to exercise his seniority rights, that is another circumstance over which the Respondent had no control in view of its past policy and practice. Fagundes asked Helmuth to swap shifts so as to accommodate Fagundes' desire to attend EMT classes, but Helmuth refused to do so. That observation is not made in the sense of being critical of Helmuth, but instead to indicate the reason for Fagundes' change from the day shift to the night shift at that time.

The change in Fagundes' job position on February 7, 1983, also should be considered in light of the new company policy on promotions, which had become effective on July 1, 1981. Thus, events involving other employees since that date, rather than before that date, are more deserving of attention.

I conclude that the Respondent has presented evidence which explains the Respondent's actions with regard to certain other employees. (See section G herein for the details.) For example, the Respondent presented evidence which establishes that Garcia was physically unable to perform the job of shafter and, therefore, he was not required by the Company to move up to that job position. Gomez was described as being "a hardship case" because of his problems in getting to work. Gonzales apparently experienced fear or concern for his family because of certain persons being around his house at night. Hansen was changed from the bottomer helper job to the bottomer operator job, although Hansen did not want to change. Nevertheless, Hansen was changed back to the bottomer helper job, but that occurred in May 1981 prior to the new company policy which was effective July 1, 1981. Pawlowski went from a pressman's job back to the press helper's job, but the Respondent presented evidence that Pawlowski had suffered physical and mental trauma due to an accident. Villanueva was permitted to swap with Helmuth so that Villanueva could go to school at night, but that was because Helmuth agreed to do so. As indicated earlier, Helmuth had greater seniority as an operator, and Helmuth had refused a similar request by Fagundes. Helmuth's change in attitude in accommodating Villanueva, but not accommodating Fagundes, is a circumstance over which the Respondent had no control.

Based on the findings of fact as set forth in section C herein, I conclude that Fagundes left work early on the night of February 8, 1983, without receiving permission from his supervisor to do so. While Fagundes was of the opinion that Supervisor Davis was testing him, I conclude that the findings reveal that Supervisor Davis had not given Fagundes permission to leave work early, and impliedly had warned Fagundes against doing so. The

foregoing circumstances are in contrast to the times in 1981 and 1982 when Fagundes had asked for, and received, permission to leave work early because of illness and because of an appointment to visit an eye doctor. Based on the findings of fact as set forth in section 8 herein, I conclude that the warning given to Fagundes by Supervisor Davis on March 4, 1983, was due to Fagundes' mistake in producing approximately 6000 tubes with no glue spots on them. At the trial, Fagundes acknowledged his error in that regard.

Based on the findings of fact as set forth in section E herein, I conclude that the warning given to Fagundes on March 9, 1983, was due to his producing approximately 6000 bags with loose walls. The Respondent presented evidence that bags with loose walls cannot be reclaimed and, therefore, those bags were considered to be wasted. Acevedo ran about 3000 bags with loose walls, but that amount was about half of what Fagundes had run. Hall produced three pallets of tubes with the side slitter missing, and he received a warning for doing so. However, the Company was able to reclaim those bags. Helmuth produced 1500 to 2000 bags with loose walls. That was a much less figure than the amount produced by Fagundes. Helmuth also produced about 4000 to 6000 bags without a slitter, but that was an error which could be corrected. Villanueva produced about 13,000 bags with the substance known as Stack-Aide on them. Villanueva's supervisor, Davis, was in error in reading the C & H Sugar order, and he mistakenly thought that Stack-Aide should be applied to those bags. I conclude from the evidence presented that Davis acknowledged his fault to his superiors and assumed his responsibility for the mistake in applying Stack-Aide to those bags. (See section G for the details with regard to these matters which are summarized above.)

Based on the findings of fact set forth in section F herein, when considered in connection with the findings in the earlier sections of this decision, and the findings in section G, I conclude that the Respondent has presented evidence which shows that Fagundes was terminated because of what the Respondent viewed to be Fagundes' unsatisfactory job performance in the tuber machine operator's position. The Respondent further presented evidence that it had terminated the employment of several other employees for various reasons. Cockran, Combs, Conley, Gilbert, Harmon, McAllister, Munroe, and Ryburn were all terminated by the Respondent. (See section G herein for the details.)

Applying the criteria set forth by the Board in its decision in *Wright Line*, 251 NLRB 1083 (1980), I conclude that the General Counsel has presented evidence at the trial which establishes a prima facie case in support of

the allegations of unfair labor practices set forth in the General Counsel's complaint. Thus, the General Counsel has established Fagundes' union activities; Respondent's knowledge of those union activities; Respondent's opposition to the union organizational activities among its employees, and Respondent's union animus; and adverse personnel actions with regard to Fagundes.

However, I further conclude, in accordance with the *Wright Line* decision, that the Respondent has presented evidence at the trial which rebuts the General Counsel's prima facie case, and which shows that the Respondent would have taken the personnel actions with regard to Fagundes in 1983, even in the absence of any union activity on the part of Fagundes. Thus, the evidence presented by the Respondent explains the reasons for the change in the job position of Fagundes on February 7, 1983, and the change in his work shift from the day shift to the night shift at that time; the reasons for the warnings which were issued to Fagundes on February 9 and March 4 and 9, 1983; and the reasons for the termination of Fagundes on March 10, 1983. As indicated earlier in this section, the Respondent has presented evidence which explains its actions with regard to other employees, and which rebuts the argument that the Respondent has treated Fagundes disparately. Accordingly, I recommend to the Board that the General Counsel's complaint allegations be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not engaged in the unfair labor practices alleged in the General Counsel's complaint in this proceeding for the reasons which have been set forth above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

It is ordered that the complaint in this proceeding be dismissed in its entirety.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.